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THE LEGAL PRESUMPTION OF REASON:
NOBLE TRUTH, USEFUL FICTION, IGNOBLE LIE

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I. INTRODUCTION

When we say that someone is responsible for a crime, what are we saying about her as a person? Are law and the legal process, in assigning criminal responsibility, saying something distinctive about the types of beings that we are? Or are they simply matching an individual and her legally substantiated thoughts and actions to a criminal wrong, in a fairly mechanical manner, which makes no necessary moral or metaphysical claims?

Certainly modern criminal law operates with a number of well-recognized assumptions, which seem to relate to our cognitive and volitional faculties: on how we think and reason and make choices and exercise control over our actions. It presumes, for legal purposes, and usually without the felt need to establish the factual truth of it, that our acts are willed; that we are sane; that we are mentally competent, that is, sufficiently rational, to commit criminal acts and be held to account for them; that we are capable of forming intentions and choosing our actions; and that if we can be found to act intentionally in a criminal manner, we can be held legally responsible.

We might gather these various assumptions together and say that criminal law works with an overarching presumption of reason: a presumption that we are rational

¹For their thoughtful advice on this paper, I thank Phyllis Crocker, Margaret Davies, Joel Finer and Ian Leader-Elliott. I am also indebted to Dena Davis, Steven Steinglass and the Faculty of Cleveland-Marshall College of Law for their hospitality and intellectual stimulation while I was The Cleveland-Marshall Joseph C. Hostetler Baker and Hostetler Visiting Professor of Law in the Fall Semester of 2004.

subjects. But does it really presuppose the capacity for practical reason in all of us who are adults: the capacity to make deliberated choices about our actions? Or is it simply a matter of legal convenience or contrivance that law deems us to be rational choice-makers who can be held responsible and assigned blame?

There is no simple or singular answer to these questions. In criminal law theory and doctrine there appear to be several competing assumptions about the sort of people that we are. My task in this paper is, first, to expound and compare what I see as the three prevailing theories of our rational natures to be found in criminal law theory, doctrine and procedure. Second, I will consider the relation between these theories of our rational natures and the actual practices of the criminal courts. And third, in the course of so doing, I will consider the beneficiaries and casualties of this criminal law theory and practical justice.

Let us first consider the cast of characters variously invoked by criminal theory and justice. The first character, I call the Noble Defendant; the second I call the Imputed Reasoner; the third I call the Self-Maximizer.

II. THREE VIEWS OF THE DEFENDANT

A. *The Noble Rational Defendant*

I will begin with the most noble and idealized image of the person brought before the criminal courts. An eminent and influential group of legal thinkers from both sides of the Atlantic holds that criminal law rightly makes strong metaphysical claims about what we are when it makes us responsible for crimes. By nature we are highly rational beings; it is reason that endows us with value, even nobility, and law does and should reflect our rational human nature by formally recognizing it and giving it important legal work to do. Criminal law, therefore, simultaneously assumes that we are, and requires us to be, beings characterized by our ability for independent reason. We may call such theorists Rationalists because they believe that it is our advanced ability to reason which most defines us and which law must reflect and respect.

Reason, they say, supplies “the precondition of liability.”² Upon it, everything else is built.³ There are factual and normative dimensions to this noble truth. It is considered factually to be so that we are by nature rational subjects of our lives. And it is considered, normatively, that we should be treated thus. It is, therefore, vital for our dignity as persons that we be treated as reasoners. One slightly paradoxical way of putting this view is to declare that it is right for us to be punished if we do wrong because it holds us to account; it obliges us to justify ourselves, to give our excuses, to be responsible. It recognizes us for the moral subjects that we are. We should, therefore, welcome and embrace our own punishment.

Michael Moore is the American theorist who has presented the boldest portrayal of the legal subject as a rational being. To Moore, someone is morally and legally a criminal legal subject, a legal person, *only* if she is a practical reasoner. That is, if

²R.A. Duff, *Law, Language and Community: Some Preconditions of Criminal Liability*, 18 OXFORD J. LEGAL STUDS. 189 (1998).

³See Nicola Lacey, *Responsibility and Modernity in Criminal Law*, 9 J. POL. PHIL. 249, 255 (2001).

she is a rational agent.⁴ “The law . . . presupposes a view of man that allows us to view his behavior as the rational product of his autonomous choices.”⁵ Law does not address itself to the irrational – to the insane, to young children, to animals.

Across the Atlantic, Oxford Professor of Jurisprudence, John Gardner, is pursuing a similar line of argument with perhaps an even more idealized view of the rational defendant. Gardner declares that we are by nature rational beings, with a powerful positive interest in presenting ourselves to the world as such and thus giving an adequate account of ourselves when we are accused of criminal wrongs. We want to justify or, at the very least, excuse ourselves, and not just with a view to getting ourselves out of trouble – which is the conventional understanding of why we give excuses. We also want to be able to demonstrate the kind of creatures that we are: creatures who act for reasons. In Gardner’s words: “explanation in terms of reasons is what a rational being aspires to.”⁶ And this is why we, as rational creatures, would positively want to avoid pleas of diminished responsibility. We do not want our reason to be regarded as legally diminished; rather, we want our actions to be understood and made comprehensible, never mind the unpleasant consequences.⁷ Moreover, we aspire to “excel in rationality”⁸ and to communicate our rationality to others. Gardner thus invokes a high degree of reason in his legal person, “a developed ability to use reasons,” not just ordinary common sense. A court of law is said to provide us with this opportunity to demonstrate our responsibility. In a trial, people are pressured “to give decent public accounts of themselves.”⁹

Invoked here is a highly rational and articulate legal actor, providing an eloquent account of his behavior, someone who offers compelling explanations for alleged criminal wrongdoing in the public forum of a criminal court of law. In short, our defendant is depicted as a sophisticated person explaining and defending her actions in a criminal trial.

An important preliminary problem with this typification of the criminal actor, to which we will return, is that criminal trials where alleged wrongdoing is stoutly defended are hardly typical. Far more common is the guilty plea and, as we will see, there are very good reasons why someone might quite rationally choose not to defend her actions and to surrender her right to a trial.

B. The Imputed Reasoner

The second character who emerges from a study of the assumptions that implicitly begin and carry forward any criminal legal matter – the assumption that if we are adults we are sane, that we are able to control our actions, that we are legally competent and fit to stand trial, and to make proper sense of the charges brought

⁴MICHAEL MOORE, *LAW & PSYCHIATRY: RETHINKING THE RELATIONSHIP* 48 (1984).

⁵Michael Moore, *The Relevance of Philosophy to Law and Psychiatry*, 6 INT’L J. L. & PSYCHIATRY 177, 179 (1984).

⁶John Gardner, *The Mark of Responsibility*, 23 OXFORD J. LEGAL STUDS. 157, 159 (2003).

⁷*Id.*

⁸*Id.* at 158.

⁹*Id.* at 168.

against us – is that of the Imputed Reasoner. Here the guiding idea is that it is highly useful, even necessary, that we are deemed to be sane and competent intentional legal actors because it enables the legal system to work. It is an exceedingly convenient thing for law to be able to deem people to be rational, without too much active inquiry into the truth of the matter, and to proceed from there to the formal determination of liability. The Imputed Reasoner, however, is best regarded as a legal invention, a device of law, brought into being for legal purposes. He is therefore a legal presumption in the formal legal sense: something deemed to be true, for legal purposes, whether or not it really is true in real life.

So we are talking here about a pragmatic fiction. The legal deeming of a person to be legally capable of committing a crime does not *necessarily* entail medical or scientific or moral/metaphysical claims or judgements about what we are.¹⁰ We have a legal fiction rather than a metaphysical truth about our natures. And yet, the fiction is real in the sense that it does solid work in law. It is an important strategic fiction, “a necessary postulate,”¹¹ because criminal justice would grind to a halt without it. As Herbert Packer observed nearly forty years ago: “Very simply, the law treats man’s conduct as autonomous and willed, not because it is, but because it is desirable to proceed as if it were.”¹²

The assumption of, and finding of, legal competence and from there the finding of responsibility are, therefore, not to be regarded as metaphysical observations about what we really are; nor are they scientific determinations about the actual cognitive capacity and agency of people brought before the law. Rather, they are a legal convenience, one which permits and enables legal evaluations of human conduct. Law and its officials simply treat people *as if* they were rational autonomous beings: human reason is asserted or stipulated by legal fiat.

In formal legal terms, this amounts to no more than the satisfaction of certain legally determined conditions of responsibility. People are adults and so they are presumed competent; they have not pleaded insanity and so they are presumed sane. They have not argued that their behavior was involuntary and so it is presumed to be voluntary. They have thought and done to the satisfaction of the court (according to the *legal* burden of proof), that which is necessary for the legal performance of the crime and often this will not require subjective fault: the performance of the prohibited acts alone will suffice.¹³ Everything is law. It is unnecessary to have demonstrable proof of a rational subject who chose to do the criminal act.

Only minimal claims are entailed here about our actual natures as rational beings. Certainly basic reason is assumed, is taken as a given, and must be positively

¹⁰Indeed Lacey raises serious doubts “about whether the relatively crude institution of a criminal court is capable, on the basis of applying general rules of law and on the basis of the sorts of evidence which it can process, of making finely-tuned judgments of capacity” Lacey, *supra* note 3, at 264. Further, Lacey inquires whether courts are competent to make “judgments about whether the accused genuinely had done, or had a fair opportunity to do, otherwise than she did.” *Id.*

¹¹MICHAEL MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* 515 (1987) (quoting JEROME HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW*, 2d ED. 425 (1960)).

¹²*Id.* (quoting HERBERT PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 74-75 (1987)).

¹³In fact, the crimes which demand full intention for all their elements are the exception rather than the rule.

disputed by a defendant who wishes to bring it into issue. But the Imputed Reasoner may be more appropriately regarded as a neat contrivance of law, the starting point of liability, which is brought into being or stipulated by legal fiat. He is not intended to convey a great deal more than that about our real human natures. He is a pragmatic device, which makes for a workable law, and it is important that law be workable.

C. The Rational Self-Maximizer

There is yet a third legal view of ourselves as reasoners which is less explicit, but firmly embedded, in the formal and informal procedures of criminal justice, rather than in the theory of criminal law. Here we meet the Rational Self-Maximizer: the self-interested chooser who is a legitimate party to legal negotiation and who is highly receptive to any strategy which will minimize punishment or the risks of punishment. While the high theorists of criminal law, as we saw, portray a Noble Defendant positively embracing responsibility in her effort to explain herself to the world, the mechanisms of criminal justice, and those who must employ them, tend to assume quite the opposite about us. They assume that we will do what we can to avoid responsibility, or more particularly, to avoid the adverse consequences of responsibility. We will plead guilty to lesser charges; we will trade in our right to fight for the security of a reduced sentence.

There are highly pragmatic reasons for this treatment of us as rational bargainers. If most people tested the system at every step, if they insisted on their innocence, or pursued the various partial defenses, the criminal justice system could not cope with the strain. And thus, the system positively assumes that most people will not defend their actions, and take up weeks in court, and that they will prove receptive to deals: that they will rationally self-maximize in a highly utilitarian fashion. The trial might be notionally the vehicle for communication between the law and the accused, but it is employed only exceptionally. And if there is a trial, it is not typically grasped as an opportunity for full and frank explanation of wrongdoing, but rather as a means of diminishing or avoiding responsibility by staying silent or seizing any defense at our disposal. This is a much less flattering view of the defendant whose sole aim is to diminish or avoid “nasty consequences”.

III. THE LOSERS

We now have arrayed before us our three criminal legal subjects: the Noble Defendant, the Imputed Reasoner and the Rational Self-Maximizer. The Noble Defendant who is vigorously engaged in self-justification of her wrongdoings within the public forum of a court of law. The Imputer Reasoner who is more legal artifact than real person, an invention of legal convenience. And the Rational Maximizer, the self-interested, even ignoble, maker of deals, who can be induced to negotiate in a Faustian manner with the representatives of the law.

I now want to consider the practical consequences of these three suppositions about our natures. I will suggest that they may work well for some criminal defendants – in particular the well educated, the articulate, and the wealthy – but that they are highly damaging to others. There are two types of losers I want to consider: those who are too poor and too inarticulate to insist on a trial, but who also lack the qualities needed to negotiate adequately their guilt within the system; and those of impaired cognition – the intellectually disabled and the mentally diseased – who are,

nevertheless, presumed sufficiently sane and comprehending to be held responsible for their wrongs.

A. On the Exclusion of the Poor and Inarticulate

Perhaps the majority of the individuals who actually appear before the criminal courts fail to conform to the rationalists' characterization of the Noble Defendant. They are not sophisticated practical reasoners. They do not offer lucid reasons for their actions; they do not refute the objections and accusations of the prosecution; nor are they the typically canny Rational Maximizers, who skillfully take advantage of any legal opportunity to minimize responsibility. As an early and famous study of American lower courts disclosed, "By conventional standards, nearly all the defendants are failures, both in life and in crime. They are poor, often unemployed, usually young, and frequently from broken homes. Most of them lack self-esteem, motivation, skill and opportunity."¹⁴ As a leading Canadian study of criminal justice reported:

The accused in the criminal process is caught up in an organizational machinery not of his own making. Furthermore, as a "one-shot" or occasional actor in the process, rather than full-time organizational member, he is not in a position to make decisions about most aspects of what is happening to him. Instead, he is subject to the orders or commands of criminal control agents and to the order...these agents reproduce in their routine work The options open to the accused are defined by the structure of the criminal process . . . the accused's freedom to make choices that might potentially serve his own interests is clearly circumscribed and often foreclosed.¹⁵

To Ericson and Baranek, "the accused is best seen as a dependant rather than a defendant."¹⁶ He is neither the rational self-justifying agent, nor the effective rational-choice maximizer. He cannot effectively respond to the open appeal to his high rational nature, he cannot effectively seize the opportunity to shine in court, nor can he respond effectively to the back-door appeal to his lower nature as a rational maximizer. He is not good at negotiating with legal officials and striking deals because he has little idea of what is going on.

But there is an even more concerning population of criminal defendants who appear to be damaged and disenfranchised by criminal law's operating assumptions of reason. These are persons who are imputed to know what they are doing but who have impaired mental capacities. They are not just poor and inarticulate, though they may also possess these characteristics. They are also suffering impaired reason. They are, nonetheless, still held to account for their criminal wrongs.

¹⁴MALCOLM FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* 4 (1979) (writing of his study of a lower court in New Haven, Connecticut).

¹⁵RICHARD V. ERICSON & PATRICIA M. BARANEK, *THE ORDERING OF JUSTICE: A STUDY OF ACCUSED PERSONS AS DEPENDANTS IN THE CRIMINAL PROCESS* 3 (1982) (internal citations omitted).

¹⁶*Id.* at 4.

B. On the Less than Fully Rational

The defense of insanity is meant to ensure that only the rational are brought to justice. And yet, the defense is, in truth, too narrow in its conception and too unattractive in its consequences to serve this function well. It does not ensure that only the fully rational are held accountable. A considerable body of empirical research has shown consistently “that the insanity defense is rarely used, is generally only successful for the most severely disordered defendants, and that insanity acquittees are often detained for extended periods.”¹⁷ Studies reveal that the insanity plea is used in less than one per cent of felony indictments and even then it has a low level of success.¹⁸

The reasons for the rarity of reliance on the defense and then its low level of success when argued are well understood. Criminal analysts point to the narrow definition of mental impairment within the insanity defense, the difficulty of establishing it, and the strong disincentive to do so because of “the inflexible disposal consequences.”¹⁹ The statistics on the rarity of use and then the difficulty of use of the defense raise serious questions about the reality of the idea of the rational person of law.²⁰ People are simply deemed to be rational for legal purposes, often despite their true mental condition. They are imputed with reason. A high level of mental impairment remains compatible with criminal responsibility and mental impairment is strongly implicated in the commission of the most serious crimes which have resulted in convictions and death sentences.

The abuses entailed in the criminal punishment of accused persons with impaired reason, particularly those charged with capital crimes, have been well described by Phyllis Crocker who has represented and extensively researched the lives of inmates of death row.²¹ She observes that “[m]any of the men who are sentenced to death suffer from mental and emotional impairments” and that “[t]he few studies conducted of men on death row [have] found that they often have extensive neurological damage, psychological difficulties, and histories of extreme childhood abuse.”²² This was also evident from Crocker’s own inquiries into the circumstances of the inmates of death row.²³

¹⁷Jocelyn A. Lymburner & Ronald Roesch, *The Insanity Defense: Five Years of Research* 22 INT’L J. L. & PSYCHIATRY 213, 236 (1999).

¹⁸*Id.* at 214.

¹⁹R. D. Mackay & G. Kearns, *More Fact(s) about the Insanity Defence* [sic], CRIM. L. REV. 714 (1999).

²⁰According to Brookbanks, “It is estimated that in the USA the insanity defence [sic] is used in only about 1% of all felony cases and is successful about one-quarter of the time.” W. Brookbanks, *Insanity in the Criminal Law: Reform in Australia and New Zealand*, THE JURIDICAL REVIEW 81 (2003).

²¹In particular in Phyllis L. Crocker, *Is the Death Penalty Good for Women?*, 4 BUFF. CRIM. L. REV. 917 (2001); see also Phyllis L. Crocker, *Feminism and Defending Men on Death Row*, 29 ST MARY’S L. J. 981 (1998); Phyllis L. Crocker, *Crossing the Line: Rape-Murder and the Death Penalty*, 26 OHIO N.U.L. REV. 689 (2000).

²²Crocker, *Is the Death Penalty Good for Women?*, *supra* note 21, at 959.

²³See generally *id.*

IV. WHO IS RIGHT? WHAT IS GOING ON?

We seem to have a genuine conundrum here, a considerable tension between theory and practice, and I suspect that several things are going on. For one thing, it is important to note that the rationalist theorists and the rationalist judges of the criminal law – those who center their theories on a highly rational and articulate defendant – are operating at a high level of abstraction. Moore is influenced by the rationalism of Kant; Gardner by the rationalism of Aristotle. Thus, their understanding of human beings, and why we are supposedly by nature rational and responsible, are derived from highly abstract theories of the person, which continue to have strong currency in legal theory. They have resort to philosophy rather than to the courtroom. They deal in metaphysical concepts and abstractions rather than in current empirical facts of criminal justice supplied by the crime statistics or the actual human content of the criminal courts.

So perhaps, out of honesty, the rationalists' theory of the person should be brought more in line with the realities of criminal law, criminal process, and the characteristics of real accused persons or, conversely, perhaps the law should be more faithful to the theory. But another response to the divorce between high theory and mundane practice is to think of the rationalists' theory as noble fiction rather than as metaphysical or empirical fact: as a statement about the way we really are.²⁴ The Noble Rational Defendant is aspiration, rather than actuality. He is not intended to be a real person; he is only a model of humanity. He is not intended to reflect real people's fuzzy and often confused thinking, their conscious and unconscious beliefs and desires, their inconsistencies, contradictions and complexities.

This interpretation of the Noble Defendant brings her closer to the Imputed Reasoner. It makes her a noble invention or an ideal type, rather than a truth claim about the nature of human beings. It is a legal fiction, but it is a real fiction in the sense that it positively exists in legal thought and exerts an effect on legal principle. It does not matter for the purposes of the symbolism that this is not really the case. The idea is that we are treated as if we were like this: and this piece of invention is meant to serve important ends of justice.

But does it really dignify all and serve the ends of justice? Let us consider how and whom the noble fiction dignifies. Arguably it describes and dignifies essentially only those who go to trial for crimes of intention, who offer reasons for their actions which will justify or excuse them. For it is these types of crimes and accused persons on which the theory seems to center. It is here that the theory has the most work to do. It seems to have little bearing on the vast majority of accused persons who do not find it in their interests to go to trial. Nor does it seem to have a bearing on those people who do elect a trial but then choose to say little, who decide to make themselves small targets, or who do everything in their power to deny their capacity for responsibility. Surely the theory treats these people as ignoble, as cravenly denying their personhood, as mere Rational Maximizers.

²⁴This does require some tampering with their work, precisely because they do seem to say (Moore especially) that they are dealing in facts about the human condition. That is, they do seem to be making empirical claims, which are hard to square with the demographics of criminal justice. Moore asserts, for example, that "[r]ationality is one basic feature persons must generally possess for our criminal doctrines to have application to them." MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW*, *supra* note 11, at 610.

V. CONCLUSION: SHOULD WE ELIMINATE THE NOBLE DEFENDANT?

We have found many problems with the theory of the Noble Defendant: logical, practical and empirical. Does this mean that we should abandon this aspirational rational person? Or should we retain her for her important symbolic significance and aspiration as a Noble Fiction rather than a Noble Truth?

The very logic and legitimacy of criminal law, and indeed of our entire legal system, is that it delivers a message to and engages with a being who has the reason and autonomy to comprehend that message – to choose to obey it or not. It would be regarded as a travesty if law, quite explicitly, treated us as beings to be manipulated rather than reasoned with. As philosopher Daniel Dennett explains in his recent book on the nature of human agency, *Freedom Evolves*, the idea that we are free responsible agents, the idea of human freedom, is part of the very air we breathe. It is as free agents that we essentially understand ourselves. Dennett wonders whether life would be “worth living if we lost our belief in our own capacity to make free, responsible decisions.”²⁵ Our conceptual universe depends heavily on this idea of freedom.

But our law and legal systems cannot practically bear the weight of this expectation. They cannot afford the money or the time to engage directly with each of their subjects. Without induced guilty pleas (achieved through the offer of reduced charges and reduced sentences), there would be far too many trials for the system to cope with. It would also be too hard on the system if all offenses required proof of that difficult requirement, subjective fault: the defendant’s intention to commit the crime. It would all be too hard if competence and sanity were always measured, if sanity and mental ability were not simply assumed, if the true extent of reason really had to be tested. These problems are endemic and fundamental.

They are resolved strategically by an imputation of reason and a supporting criminal law theory which concentrates on rational and articulate persons engaged in a full justification of themselves within a trial. It is solved, in pragmatic fashion, by rules which simply deem people to be rational; and by a theory which treats the trial as typical, rather than exceptional. Our liberal democratic values, our fundamental political beliefs in a free society of rational beings, would be too sorely tested by a law which no longer professed to speak to all, which abandoned the pretence of a law for all and which spoke only to the clever ones.

Or perhaps we should reduce our expectations about criminal law and justice. We might admit that law does not typically engage openly with articulate rational individuals. The trial is hardly encouraged. Accused persons are offered strong inducements not to profess their innocence, not to demand their day in court. Reason is presumed rather than established. The moments of reasoned communication between accuser and accused are constrained by the practical demands on the system and we may simply have to accept this. Or we might protest that the costs to certain individuals in the system are too great: as criminal lawyers, we cannot in conscience invoke reason as our guiding principle, and then see those of impaired reason punished, for us, in the name of the state.

²⁵DANIEL C. DENNETT, *FREEDOM EVOLVES* 10-11 (2003).